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November 23, 1988

Mr. Greg Eckert
South Bay Section T-4-5
Toxics and Waste Management Division

Mr. Glenn Kistner
South Bay Section T-4-5
Toxics and Waste Management Division

Mr. David McFadden
Assistant Regional Counsel

U.S. Environmental Protection Agency
215 Fremont Street
San Francisco, California 94105

Re: Raytheon, Fairchild and Intel Superfund Site

Dear Messrs. Eckert, Kistner and McFadden:

On September 14, 1988, the EPA notified our client, Genus Inc. ("Genus"), by a General Notice Letter¹ that Genus "may be" a potentially responsible party ("PRP") under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") with respect to the Raytheon, Intel and Fairchild Superfund sites

¹General Notice Letter to Norm Zetterquist, Director, Process Development, Genus, from Jeff Zelikson, Director, Toxics and Waste Management Division, U.S. Environmental Protection Agency, September 14, 1988.

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(the "Superfund Site").² As discussed below, Genus does not believe that it is legally responsible for the remediation of contamination to the MEW Study Area and, consequently, Genus respectfully requests that you do not send Genus a Special Notice Letter naming Genus as a PRP with respect to such site.

GENUS IS NOT RESPONSIBLE FOR CONTAMINATION OF
ANY PROPERTY IN THE MEW STUDY AREA

Genus occupies a building at 515 Ellis Street, which is not within the Superfund Site. Thus, it is impossible for Genus to be an "owner" or an "operator" of a facility within the Superfund Site.

Moreover, Genus' 515 Ellis Street property is down-gradient from the Superfund Site and it is impossible for any of the contamination currently present at the Superfund Site to be attributable to Genus or the 515 Ellis Street property. Accordingly, Genus could be named as a PRP pursuant to the EPA's cost recovery rights under CERCLA, only if the entire MEW Study Area is added to the National Priorities List ("NPL") and Genus is otherwise legally responsible for the contamination at that site.³

Notwithstanding the fact that the MEW Study Area is not an NPL site, the EPA seems to be asserting that its broad enforcement powers against anyone who operates a hazardous materials facility under the Resource Conservation and Recovery Act ("RCRA") is a sufficient basis for jurisdiction over Genus with respect to the clean-up of the MEW Study Area. However, there is also no basis for action against Genus for clean-up of the MEW Study Area under RCRA, since there is no evidence that Genus has violated RCRA or that Genus has caused a release of hazardous materials at the 515 Ellis Street property.

In the General Notice Letter received by Genus, the EPA states that it believes that Genus could be a PRP based on the Agency's investigation of the MEW Study Area.⁴ However, the Remedial

²515 Ellis Street is part of the Middlefield-Ellis-Whisman Study Area ("MEW Study Area"), as that area is defined by the Remedial Investigation Report. As Genus understands it, the Remedial Investigation encompassed an area that extended beyond the boundaries of the Superfund Site itself and the Superfund Site consists only of the Raytheon, Fairchild and Intel facilities.

³Under EPA Regulation 40 CFR Section 300.66(c)(2), only those sites listed on the National Priorities List will be eligible for remedial action by the EPA under CERCLA.

⁴General Notice Letter, page 2.

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Investigation Report ("RI") for the MEW's Study Area, contains no evidence that Genus contributed to any contamination or that a release of hazardous materials has ever occurred at the 515 Ellis Street site. The RI categorizes 515 Ellis Street as a "Tier 2" site and, according to the RI, properties that fall within Tier 2 are "properties at which at least one targeted chemical is used, but a release is not known to have occurred".⁵

Furthermore, since Genus received the EPA's September 14, 1988 Request for Information, Genus has conducted a comprehensive search of its files and records and has surveyed its employees in order to ascertain whether there have been any releases of hazardous materials to 515 Ellis Street from Genus' operations. This investigation has shown that Genus has not contaminated 515 Ellis Street and, therefore, could not be a source of contamination for the MEW Study Area.

Its investigation revealed that when Genus moved to the 515 Ellis Street site in 1982, Genus was aware that neighboring businesses had been subject to governmental investigations for hazardous materials contamination. To insure that Genus' use of hazardous materials would not endanger the environment or the safety of its employees and to reduce any risk that Genus would be held liable for the contamination that was already known to be present in the area, Genus hired a consultant with experience in regulation of hazardous materials to design and construct its facility at 515 Ellis Street. Based on the consultant's advice, Genus designed the 515 Ellis Street facility without underground storage tanks or any other form of underground storage.

From the beginning of its occupancy, Genus has also taken precautions to properly use, handle and store the small quantities of hazardous substances that it must use in its operations. Genus confines all its outdoor storage of hazardous materials to a concrete and asphalt storage area, which is surrounded by a high chain-link fence, secured by a padlock, covered by a roof, and secondarily contained by a sealed berm. The liquid and solid hazardous waste Genus stored outside of the building is stored in containers no larger than 55-gallon drums and no more than two of these drums are on-site at any one time. These wastes are routinely hauled away by waste haulers -- generally before the drums are even half full. All other hazardous materials in the outdoor storage areas are materials that Genus has recently received directly from its suppliers. These materials are stored

⁵Appendix B of the RI presents the results of a search by Meredith/Boli & Associates, Inc. ("M/B&A"), for potentially responsible parties. Remedial Investigation Report, Volume Three, Appendix B, Harding Lawson Associates, July 1, 1987.

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in unopened bottles, as received from the supplier, within cabinets that have been approved by the Mountain View Fire Department and are only opened when they are taken inside of the building. All other storage of hazardous materials is contained within the buildings and is limited to small working quantities of hazardous materials that are stored in containers approved by the Mountain View Fire Department and secondarily contained within cabinets specifically designed to store hazardous materials.

In short, although the General Notice Letter that Genus received from the EPA states that based on its investigations, the EPA "has reason to believe" that "releases from your facility may have contributed to contamination at the site", neither the RI nor the comprehensive investigation by Genus has disclosed any evidence to suggest that the statement is true. Genus believes that, because there is no evidence that Genus contributed to the contamination, it should not receive a Special Notice Letter naming Genus a PRP of the Superfund Site (especially since the 515 Ellis Street property is not within the Superfund Site) and that no other action should be taken against Genus with respect to the plume of contamination affecting the MEW Study Area.

GENUS IS NOT LEGALLY RESPONSIBLE FOR REMEDIATION
OF THE PLUME OF CONTAMINATION UNDER ITS FACILITY

The General Notice Letter also implies that liability can be imposed upon Genus simply because it is an "owner/operator of a facility located at the MEW Site". Genus recognizes that many issues of liability under CERCLA are not yet resolved; however, it is not aware of any case law or statutory authority that would make Genus a PRP under CERCLA (or any other provision of the law) with respect to a plume of contamination under the 515 Ellis Street property, absent a showing that Genus contributed to the plume. Under Section 107 of CERCLA, current owners and operators are liable for response costs if releases have occurred from their facility. CERCLA does not require a party to contribute to the cost of an area-wide investigation and remediation, simply because the party uses chemicals on property that lies above a contaminated groundwater plume.

A recent case, Dedham Water Company v. Cumberland Farms, Inc.,⁶ held that unless it is shown that the operator of a facility above a groundwater plume actually contributed to the contamination in the plume, the party is not liable under CERCLA for any cost associated with the plume. In Dedham, the defendant had released substances identical to substances in the plume onto its property,

⁶Dedham Water Company v. Cumberland Farms, Inc., 689 F. Supp. 1223 (D.C. Mass., 1988)

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but argued that it was not liable under Section 107 because the contaminants it released had not contributed to the groundwater contamination. The court agreed with the defendant and held that, since there was no evidence that the defendant's release had actually contributed to the contamination, the defendant was not liable under CERCLA.

The facts applicable to Genus are more compelling than the facts applicable to the defendant in the Dedham case. Here, there is nothing to show that Genus contributed to any contamination at all, not even contamination that did not merge with the plume. Accordingly, pursuant to the authority of the Dedham case, Genus respectfully requests that it not receive a Special Notice Letter that it is a PRP with respect to the Superfund Site or the MEW Study Area.

**NAMING INNOCENT PARTIES AS PRPs WILL NOT PROMOTE THE
REMEDiation OF THE MEW STUDY AREA**

Genus recognizes and appreciates the difficulties the EPA faces in managing the remediation of the MEW Study Area. Genus understands that the EPA is attempting to facilitate an expensive and lengthy remediation process with a small staff and an enormous workload. Genus does not believe, however, that the EPA will expedite the remediation of the MEW Study Area by sending Special Notice Letters naming parties as PRPs who have not contributed to the contamination at the site and who are not the owners of the site. If parties who have no fault with respect to the contamination and are not liable because of their ownership receive Special Notice Letters at the same time that the "Tier 1" parties (whose liability under CERCLA, as indicated by the RI, is considerably clearer than the liability of the innocent parties), the progress of settlement discussions will undoubtedly be impeded and delayed since the legal responsibility of the parties asked to come to agreement is so markedly different.

If they negotiate at all,⁷ the innocent parties will undoubtedly seek de minimis settlements. Because of this fact and

⁷Because of the legal effect an admission of liability for environmental impairment can have upon a company, it may be difficult for the officers and directors of innocent parties to decide to waive the company's legal right to establish its innocence in court. Such officers and directors may believe that their fiduciary obligations to the company's shareholders require them to exhaust their legal recourse prior to entering into settlement discussions.

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in light of the EPA's official policy to avoid expending significant resource on de minimis settlements until the bulk of the cost of remediation activities has been funded by others⁸, delivery of a Special Notice Letter to persons who have no demonstrated or suspected responsibility for the contamination (such as Genus), is likely to prohibit a comprehensive settlement between all parties receiving the letter. This would be very unfortunate in this case, since sufficient funds to cover the entire remediation cost appear to be available from parties who are not entitled to de minimis settlements.

Finally, Genus supports the EPA's efforts to effect remediation of the MEW Study Area and will cooperate with the EPA in connection with any investigation, study or inspection that the EPA may need of its 515 Ellis Street property without the necessity of the EPA's naming Genus as a PRP in a Special Notice Letter. In this regard, as the EPA is aware, Genus is only a tenant at 515 Ellis Street and Genus, therefore, cannot unilaterally grant the EPA access to the site. In certain situations, Genus may need to look to the owner of the site, Bank AmeriLease, for performance and cooperation. In those cases, Genus will use its best efforts to obtain Bank AmeriLease's consent to such access and will otherwise enforce its lease and comply with all applicable laws in connection with any investigation or remediation activities required by the EPA.

For all the reasons stated above, Genus believes that the EPA should not deliver a Special Notice Letter to Genus identifying it as a PRP with respect to the Superfund Site and that the public's interest in accomplishing a prompt remediation of the MEW Study Area plume would not be served by delivery of the Letter to Genus.

If you have any questions concerning the foregoing, or if we can amplify any of the thoughts contained in this letter, please contact the undersigned. Genus has confidence that you will consider its request favorably, or that you have already concluded

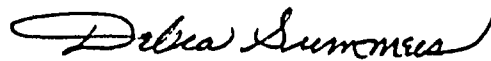
⁸Superfund Program: De Minimis Contributor Settlements, 52 Fed. Reg. 24,333, 24,335-36 (1987).

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from your own investigations that Genus should not receive a Special Notice Letter. Thank you in advance for your consideration of this matter.

Best regards,

WILSON, SONSINI, GOODRICH & ROSATI

A handwritten signature in cursive script, reading "Debra S. Summers".

Debra S. Summers

DSS:ppa

cc: Mr. Ronald Dornseif
Mark A. Bertelsen, Esq.